

No. 80626-8

SUPREME COURT

OF THE STATE OF WASHINGTON

OTIS HOUSING ASSOCIATION, INC.,
a Washington corporation, Petitioner

v.

JOHN HA and MIN HA,
husband and wife, Respondents

SUPPLEMENTAL BRIEF OF RESPONDENTS
JOHN HA AND MIN HA

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A. TABLE OF AUTHORITIES

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B. INTRODUCTION

Otis Housing Association, Inc. (hereinafter "Otis") seeks to enforce the provisions of an arbitration clause contained in an option to purchase agreement between the parties. John and Min Ha (hereinafter "Ha") successfully argued to the lower courts that Otis is precluded from invoking the arbitration clause because:

- A. Otis failed to raise the issue of arbitration in its response to a prior lawsuit between the parties.
- B. Otis sought affirmative relief regarding the option to purchase during oral argument in the prior lawsuit.
- C. Otis failed to exercise the option prior to its expiration, rendering the Real Estate Option to Purchase, including the arbitration clause, void and unenforceable.

This Supplemental Brief applies the reasoning contained in the January, 2008 case of Ives v. Ramsden, 142 Wn. App 369, 383, wherein this Court found that defendant Ramsden impliedly waived an arbitration clause by failing to raise the issue in his answer, and by not proposing a court order to stay the action to allow the parties to arbitrate.

C. COUNTER-STATEMENT OF ISSUES PRESENTED

1. Does a party waive the right to seek enforcement of an arbitration clause by failing to raise the issue of arbitration in their answer to a Complaint filed in the Superior Court?
2. Does an arbitration clause remain enforceable after both parties previously sought affirmative relief from the Superior Court without raising the issue of arbitration?
3. Is an arbitration clause still enforceable after the contract containing the arbitration clause has lapsed and become void?

D. COUNTER-STATEMENT OF CASE

Otis and Ha entered into two interrelated contractual agreements with regard to real property located in Spokane, Washington known as the Otis Hotel. The two agreements are generally described as follows:

1. An agreement entitled "Building Lease" [CP 30] (hereinafter referred to as the "Lease"); and
2. An agreement entitled "Real Estate Option to Purchase" [CP 20] (hereinafter referred to as the "Option to Purchase").

Over the years from 1997 to 2005 there were numerous amendments to both the Lease and the Option to Purchase. The Option to Purchase was last modified in 2003, when the parties entered into a THIRD ADDENDUM TO REAL ESTATE OPTION TO PURCHASE. [CP 29] According to the terms of the Option to Purchase, as modified by the THIRD ADDENDUM TO REAL ESTATE OPTION TO PURCHASE, the sale of the Otis Hotel was to close no later than December 31, 2004. [CP 32, 16]

In 2005, prior to the present lawsuit, Ha filed an unlawful detainer action against Otis in Spokane County Superior Court, State of Washington, under cause no. 05-2-03598-1. [CP 18, 75]

On August 30, 2005, Otis served an "Answer and Counterclaim" on Ha's counsel in response to the unlawful detainer action. [CP 69-70] Mr. Paul Allison, counsel for Otis, represented to the court that he had filed the aforementioned Answer and Counterclaim. [CP 67]

Before the trial judge in the unlawful detainer action, Mr. Allison argued that the Option to Purchase had been exercised. [CP 67] He further argued that his client was in possession of the property under a real estate purchase and sale agreement, which was made up of the option and the addenda to the option. [CP 67]

Mr. Allison asked that Judge Moreno order the parties to proceed to closing pursuant to the Option to Purchase, and offered argument to Judge Moreno on issues concerning the Option to Purchase.

[CP 67] Judge Moreno reviewed the case, including the Option to Purchase and the Addendums to Option to Purchase, and made a ruling. [CP 67]

Judge Moreno ruled that there had been an option to purchase agreement between the parties that had been amended three (3) times. [72-74] With respect to the third and final addendum [CP 29-34], the court noted that the defendant, Otis, was required to meet, but in fact had not met in this instance, "the very specific terms of the lease" and [the] designated closing date of "December 31, 2004," as required under this third addendum [CP 29-34], and so the option had not been properly exercised by Otis. [RP 4; CP 72-74]

After Judge Moreno's ruling, Otis filed a second lawsuit (the present lawsuit) seeking an Order directing Defendants (Ha) to proceed with arbitration. [CP 1] On December 29, 2005 Otis filed an application for an Order appointing an arbitrator [CP 5]

On March 10, 2006, the trial court entered an Order Denying both the Application for Arbitration and the Application for the Appointment of an Arbitrator. [CP 74] Otis filed a Motion for Reconsideration on March 17, 2006 [CP 78], which was denied on March 31, 2006. [CP 107] This appeal followed. [CP 109-116]

E. ARGUMENT

1. OTIS WAIVED THEIR RIGHT TO DEMAND ARBITRATION.

This Court recently addressed the issue of waiver of an arbitration clause in the case of Ives v. Ramsden, 142 Wn. App. 369 (2008). In Ives, this Court noted that "it is well established that a party to an arbitration clause may waive its enforcement." Ives v. Ramsden, 142 Wn. App. 369, 382-383 (2008) (citing Finney v. Farmers Ins. Co. of Wash., 21 Wn. App. 601, 620, 586 P.2d 519 (1978) (citing Pedersen v. Klinkert, 56 Wn. 2d 313, 352 P.2d 1025 (1960)), affirmed on other grounds, 92 Wn.2d 748, 600 P.2d 1272 (1979)).

A. Otis waived their right to Arbitration by not raising the issue in their Answer.

In Ives, the defendant Ramsden argued that he did not waive arbitration because he invoked it in his answer. Ives v. Ramsden, 142 Wn. App 369, 383. However, Ramsden's answer did not use the term "arbitration," did not mention any contract, and did not hint that judicial remedies were totally foreclosed. Ives, at 383. This Court found that the trial court in Ives "did not err in ruling that Ramsden's answer did not adequately raise the arbitration issue." Ives 142 Wn.App at 383.

Here, Otis' answer to the Complaint for Unlawful Detainer similarly failed to use the term "arbitration," did not request arbitration, and did not hint that judicial remedies were totally foreclosed. [CP 69,70] Otis' answer is silent on the issue of arbitration. Clearly, Otis waived their right to arbitration of the dispute(s) with Ha by not raising it in their answer to the Complaint of Unlawful Detainer.

B. Otis waived their right to Arbitration by seeking relief from the Superior Court.

The trial court herein found that: "Otis Housing Association, Inc. previously sought relief from the Spokane County Superior Court regarding the Option to Purchase in the case of Ha v. Otis Housing Association, Inc., Spokane County Superior Court Cause #05-2-03598-1." [CP 75]

Before the trial judge in the unlawful detainer action, Mr. Allison argued that the Option to Purchase had been exercised. [CP 67] He further argued that his client was in possession of the property under a real estate purchase and sale agreement, which was made up of the option and the addenda to the option. [CP 67] Mr. Allison asked that Judge Moreno order the parties to proceed to closing pursuant to the Option to Purchase, and offered argument to Judge Moreno on issues concerning the Option to Purchase. [CP 67]

Only after an unfavorable result did Otis argue for the first time that the arbitration clause be invoked. In summary, Otis's conduct was

"inconsistent with any other intention but to forego" their right to arbitration. Shoreline School District No. 412 v. Shoreline Ass'n of Educ. Office Employees, 29 Wn.App. 956, 958, 631 P.2d 996, 639 P.2d 765 (1981), review denied, 97 Wn.2d 1009 (1982).

2. THE TIME FOR EXERCISING THE OPTION LAPSED, AND AS A RESULT THE OPTION TO PURCHASE BECAME NULL AND VOID.

The record does not contain written notice showing Otis exercised its option after the third addendum to the Option to Purchase was executed. According to the Option to Purchase, as amended, the transaction was to close no later than December 31, 2004. The trial court found that Otis "materially failed to timely exercise and/or close the Option to Purchase. [CP 74] Further, the trial court found that "The time for exercising and/or closing the Option to Purchase has expired." [CP 75] The Court of Appeals determined that the option to purchase, including the arbitration clause, no longer had any force or effect; thus, it was void.

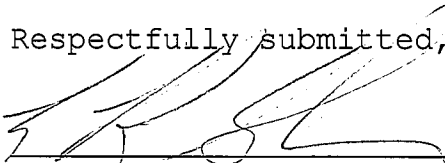
F. CONCLUSION

Otis failed to raise the issue of arbitration in its response to a prior lawsuit between the parties. Further, Otis sought affirmative relief regarding the Option to Purchase during oral argument in the prior lawsuit. The option to purchase the subject real property expired well prior to both lawsuits.

Based upon the foregoing points and authorities, the respondents respectfully request that the judgment of the Superior Court of Spokane County, State of Washington, be affirmed and, accordingly, that this appeal be dismissed with prejudice.

June 19, 2008

Respectfully submitted,

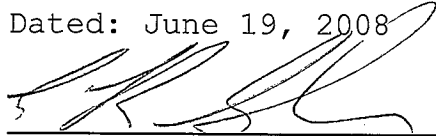


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Respondents

I certify under penalty of perjury under the laws of the State of Washington that I mailed and/or delivered a true and correct copy of the foregoing Brief of Respondents, to the following persons, by first class mail, postage prepaid, on June 19, 2008:

Paul J. Allison
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Dated: June 19, 2008

A handwritten signature in black ink, appearing to read 'ER Shumaker', is written over a horizontal line.

Eric R. Shumaker WSBA #22231